

In the United States District Court
For the Eastern District of Pennsylvania

3

Wessie Sims pro se
Plaintiff

vs.

City of Philadelphia, et al
Defendants

Civil Action

NO: 12-5486

Date 2-6 2015

FILED

FEB 10 2015

MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

Motion For Rehearing:

Wessie Sims, plaintiff in the Captioned Action, respectfully requests that the Motion for rehearing be granted. The purpose of the Motion for rehearing is to correct a manifest Notorious error of law or facts and to present newly discovered evidence that the mail was delivered.

1. Docket pursuant to Fed R. Civ. P. 79(a).
2. Entered 11-21-12
3. Docket sheet attached.
4. The City refused personal service 10-22-12 entered 10-24-12.
5. Supporting Documents enclosed.

Respectfully
submitted.

Wessie Sims.

4925 W. Stiles St.
Philadelphia, PA 19131

In the United States District Court
For the Eastern District of Pennsylvania

Wessie Sims pro-se
Plaintiff
V.
City of Philadelphia et al.
Defendants.

Civ. action
No: 125486
Date 2-6-2015

Certificate of service

The undersigned hereby Certify that a true and
Correct copy of the foregoing Response to the
Motion for Rehearing and memorandum
of law was served by first class United States
mail, postage pre-paid on 2-6-2015

all Correspondence to
attorney of Record
plaintiff's Agent:
Sharon N. Harvey Esq.
By E-mail address.

Name: Anne B. Taylor Esquire
Law Department, City of
Philadelphia 14th floor
1515 Arch Street.
Philadelphia, P.A. 19102

By Wessie Sims pro-se.

The United States District Court
For the Eastern District of Pennsylvania

Wessie Sims pro-se
plaintiff

Vs.
City of Philadelphia, et al
Defendants

Civil action
NO: 12-5486
Date: 2-6-2015

Plaintiff's Memorandum of Law in
Response to the Motion to Dismiss

The City filed a motion to dismiss the Complaint
filed 9-25-12 pursuant to Rule 12(b)(6) for
failure to state a claim upon which relief
can be granted. Fed R. Civ. P. 12(b)(6).
The Court granted the motion 1-10-13.

A. In re Rockefeller Ctr. props.
inc. sec. Litig 311, F.3d, 198
215-16 3rd Cir. 2002:

1. The Court held: Dismissal under Rule
12(b)(6) is not appropriate unless it
appears beyond doubt that plaintiff
can prove no set of facts in support
of his claims, which would entitle
him to relief.

Federal Civil procedure 1835
When Considering a motion to dismiss
a Complaint, the Court must view all the
allegations contained therein as true;

Victor P. Cibellis, plaintiff
v.

Alexander Costar et al.
Defendants Civ. A. No. 74-400

United States District Court U.D. of
Pennsylvania, Sept. 10, (1974).

Hains v. Kerner et al.
per curiam,
United States Court of Appeals
for the Seventh Circuit No. 74-5035
argued Dec 6, 1971, decided Jan. 13, 1972.

1. The Court held: the pro-se Complaint should not have been dismissed without affording the opportunity to present evidence on his claims 437 F.2d 71 and;
 2. The Court conclude that the pro-se petitioner is entitled to an opportunity to offer proof.
- The Court reversed the judgment and remanded the case for further proceedings.

The District Court dismissed the pro-se
Complaint Without the opportunity
to amend the Complaint.

Phillips v County of Allegheny
515 F.3d at 228, 3d Cir. (2008).

The Court held pursuant to Fed. Rule Civ. P.
12(b)(6) 28 U.S.C.A.

unless the Court finds that amendment
would be futile the Court must inform
plaintiff she has leave to amend the
Complaint with a set period of time.

In the event the Complaint fails
to state a claim the District Court
must give plaintiff the opportunity
to amend the Complaint.

Shane v. Jauser, 213 F.3d-113,
3d Cir. (2000).

Because the District Court did not
follow these dictates the 3d Cir.
Reversed in part and Remanded.

This Case Was dismissed Without
the opportunity to be Heard.

Scope:
ABA Model Code of Judicial Conduct:

Rule 2.6: Ensuring the Right to be Heard.

(A) a Judge shall accord to every person who has a legal interest in a proceeding or that persons lawyer the right to be heard according to the law.

(b) The right to be heard is an essential component of a fair and impartial system of justice.

Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

Canon 2 Rule 2.7

Responsibility to Decide:

C. a Judge shall hear and decide matters assigned to the Judge except when disqualification is required by Rule 2.11 or other law.

Canon 2 Rule 2.2: impartiality and fairness:

a Judge shall uphold and apply the law
and shall perform all duties of
Judicial office fairly and impartially.

Canon 2 Rule 2.2 Impartiality
And Fairness:

States: It is not a Violation of this
Rule for a Judge to make reasonable
accommodations to ensure pro-se
litigants the opportunity to have
their matters fairly heard. Where:

This Case Was dismissed Without
a hearing, Constitutional Law 318:

1. Constitutional Guarantee of Due process
does not require a particular form of
procedure, or a hearing at initial
stage of the proceeding but only that
requisite hearing be afforded before
administrative action becomes final.

5 U.S.C.A. 554, 556, 702.

Due process

King v. Hampton E.D. Mo. (1971) 327 F. Supp. 714,
affirmed 451 F.2d. 247, Constitutional Law 318(1).

See: *King v. Hampton* 337 F. supp.
714, April 22, (1971).

The scope of this Court's review is set forth in 5 U.S.C. 706:

The reviewing Court shall:

1. Compel agency action unlawfully withheld or unreasonably delayed; and
2. Hold unlawful and set aside agency action, findings, and conclusions found to be:
 - A. Arbitrary, Capricious, an abuse of discretion, or otherwise not in accordance with law.
 - B. Contrary to Constitutional right, power, privilege, or immunity.
 - C. in excess of statutory jurisdiction, authority or limitations, or short of statutory right.
 - D. Without observance of procedure required by law.

F. unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute, or

F. unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

prejudicial error substantially affects an appellant's legal rights and obligations.

Erskine v. Upham,

56 Cal. app. 2d 235, 132 P.2d 219, 228.

such may be ground for new trial and reversal of judgment. Fed. R. Civ. P. 59.

trial de novo: a new trial or retrial held in which the whole case is retried as if no trial whatever had been had in the first instance. *Housing Authority of the City of Newark v. Norfolk Realty Co.*

71 N.J. 314, 364, A.2d 1052, 1058.

Due process:

It is well settled, however, that the Constitutional guaranty of due process does not require a particular form of procedure, or a hearing at the initial stage of the proceeding, but only that the requisite hearing be afforded before the administrative action becomes final.

CF. *Euling v. Mytinger & Asselberry*,
339 U.S. 594, 70 S. Ct. 870, 94 L. Ed. 1088.

Inland Empire Dist. Council, Lumber and
Sawmill Workers Union, Lewiston,
Idaho v. Millis, 325 U.S. 697, 65 S. Ct.
1316, 89 L. Ed. 1877, *Swift & Co. v. United States*
7 Cir. 393, F.2d 247.

The protection against governmental
arbitrariness is the Core of Due process
XIV. See: *Hurtado v. California*
argued January 22nd - 23 (1884).
Decided March 3d. (1884).

Constitutional law.

The Cognizable level of executive abuse
of power is that which shocks the
Conscience e.g. id at 128.

Constitutional Law 4050.

Institutional Review Board

There are three possible standards
 Can be used to determine whether
 state action shocked the Conscience
 as a required element of Due process (Prima):

1. Deliberate indifference.
2. Gross Negligence, or Arbitrariness
 that indeed shocks the Conscience.
3. Or intent to Cause Harm.

A. Supreme Court: The Behavior of the
 Government shocks the Conscience
 of a reasonable observer.
 8 County of Sacramento v. Lewis
 523, U.S. 813, 118 Supreme Ct. 1708, 140,
 L. Ed. 2d. 1043, (1998).

Failure to accord the parties a full
 right to be Heard according to the law
 in Violations of Canon 3, (a) (4) of the
 Code of Conduct for U.S. Judges.

Preamble:

This Code shall constitute the Canon
 of Judicial Ethics referenced in
 Article V section 17 (b) of the Pennsylvania:

Constitution which states in pertinent part: Justices and Judges shall not engage in any activity prohibited by law, and shall not violate any Canon of legal or Judicial ethics prescribed by the Pennsylvania Supreme Court.

County of Sacramento v Lewis
523, U.S. 833, 118 S. Court 1708,
140, L. Ed. 2d 1043, (1998).

The Court Held: The Behavior of the government shocks the Conscience of a reasonable observer.

Amendment XIV U.S. C.A.
Constitutional law 4050.

Three possible standards can be used to determine whether state action shocked the Conscience required element of due process.

1. Deliberate indifference, (2) Gross negligence, or arbitrariness that indeed shocks the Conscience, or intent to cause harm.
Defendants' Were Deliberately indifference.
A Breach of Duty.

The policy maker is responsible for the policy or through acquiescence for the Custom as stated by the Supreme Court in *Jett v. Dallas Independent School District*, 459 U.S. 109, S. Ct. 2702 2723, 105, L. Ed. 598, (1989).

Municipal policy inflicts the injury.
424 U.S.C.A. 1983.

Local Governing bodies and local officials sued in their official capacities can be sued directly under 1983 for monetary, declaratory and injunctive relief in those situations the policy statement, ordinance, regulation or decision officially adopted or promulgated by those who edicts or acts may fairly be said to represent official policy. Municipalities have no reliance interest that would support an absolute immunity pp. 699-700. Decision maker established a policy or well settled custom.

The policy maker was deliberately indifferent to the need. The municipal action was taken with deliberate indifference to its known or obvious consequences. The policy maker has failed to act affirmatively at all. The need to take some action to control its employees.

Ex parte Virginia
 Supreme Ct. Oct. (1879).

sect. 3. The inhibition contained in the fourteenth Amendment means that no agency of the State, or of the officers or agents by whom her powers are exerted shall deny to any person within her jurisdiction the equal protection of the laws. Whoever by virtue of his public position under a State deprives another of life, liberty, or property, without due process of law, or denies or takes away the equal protection of the laws, violates that inhibition. And as he acts in the name of and for the State, and is clothed with her power, his act is her act; otherwise, the inhibition has no meaning, and the State has clothed one of her agents with power to annul or evade it.

sect. 4. That Amendment was ordained to secure equal rights to all persons.
 To render its purpose effectual, Congress is vested with power to enforce its provisions by appropriate legislation. Such legislation must act, not upon the abstract thing denominated a state, but upon the persons who are its agents in the denial of the rights which was intended to be secured. Such is said act of March 1 (1875) and is fully authorized by the Constitution.

There are two privileges and immunities Clause:

1. The provision in art. IV states that the citizens of each State shall to all privileges and immunities of citizens in the several States.
2. While the XIV Amendment provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.
Toomer v. Witsell, 334 U.S. 385, 68, Supreme Ct. 1156, 92, L. Ed. 1460.

Privilege is a particular benefit, an advantage enjoyed by a person, Company, or class, beyond the common advantages of other citizens, an exceptional and extraordinary power or exemption.

a state law that immunizes Government Conduct otherwise subject to suit under 42 U.S.C.A. 1983 is preempted.

Felder v. Casey, 487 U.S. 131, 108 S.Ct. 2302, 101, L. Ed. 2d. 123.

Standard of Review

42 U.S.C. 1983 provides a Federal Cause of action for a plaintiff whose Constitutional rights have been violated by a person acting under color of state law. *Natale v. Camden County Corr. Facility* 318 F.3d 575, 580, 81 3d Cir. (2003).

A municipality is liable under Section 1983, where the municipality's policy or custom caused the alleged Constitutional injury. *Monell* 436 U.S. at 694, (1978).

Civil Rights 13, 42 U.S.C.A. 1983.

The Defendants acted under color of a Statute, Ordinance, regulation, Custom or usage of State or territory and deprived plaintiff of a right, privilege or immunity secured by the Constitution and laws of the United States are essential elements of a claim under section of civil rights act making one who acting under color of state law, subjects any citizen to deprivation of any rights, privileges, or immunities secured by the Federal Constitution and laws of the United States liable to injured party in action at law. The policy caused a Constitutional Violation by employees.

The Sherman Amendment to the Bill which became the Civil Rights Act of (1871) 17 Stat. 13 the precursor of (1983) The Amendment would have held a municipal Corporation liable for damage done to the person or property of its inhabitants by private persons riotously and tumultuously assembled. Cong. Globe, 42d Cong. 1st sess, 749 (1871).

A Cause of action was given to persons injured by any person's riotously and tumultuously assembled together with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States. April 18, (1871)

The first Conference Committee completed its work on H.R. 320. The Conference Committee draft of the Sherman Amendment 17 Stat 13,

It is when execution of a Government's policy or custom, whether made by its makers or by those whose edicts or acts may fairly be said to represent official policy inflicts the injury that the Government as an entity is responsible under (1983) This Case involves official policy as the moving force of the Constitutional Violation.

The Zoning Board of adjustment members, who are individual defendants, fraudulent misrepresentation resulted from a city policy which arose out of a formal proclamation from a person with final authority
andrews v. city of philadelphia.
895 F.2d. 1469, 1480, 3d. cir (1990).

The municipality's policy was the direct cause of plaintiff's injury.

Monell v. New York Department of social services. 463, 415. 658, 988. Ct. 218, (1978).

Final authority establish municipal policy with respect to the action issues an official proclamation, policy, or edict.

a custom does not require a formal proclamation, but it must constitute a course of conduct is so well settled and permanent as virtually to constitute law. *Bielericz v. Dubinon*
915, F.2d. 845, 950. 3d. cir (1990).

andrews 895, F.2d, at 1480.

at the March 31, 2010 Hearing:

The planning Commission stated:

1. allowing the owner to use the subject property as a rooming house for five occupants would represent an abuse of the subject property.

This was false: where Code 14-205 district permitted uses in an R-10 District allows multiple uses.

2. where L-1 determined that the proposed use of the subject property for five occupants was prohibited under sect. 14-205, this was false.

3. where Code pm-405.1.2 allows 5 occupants and one bathroom. plaintiff would only have five.

4. where the Chairwoman and member complained of pits and bathrooms, they all was false.

5. at page 3 of Findings of fact:
Zenobia Harris from Councilman Darrell Clark's office (Councilman at that time) testified that rooming houses is not something we necessarily tend to support. see 3/3/10 N.T. at 7.

6. Although rooming Houses are permitted under the Philadelphia zoning Code. all Codes were signed in law at City Council's first setting.

This entire case was false Representation.

Each and all Defendants are in Violation of a Federal
Statute: Federal Criminal Statute 28 U.S.C. 1001

False Statement:

Title 42 U.S.C.A. 1983 Rev. Stat. 1979

Derived from 1 of the Civil Rights act of
April 20, (1871) 17 Stat. 13
provides:

That any person who under Color of any law statute,
Ordinance, Regulation, Custom, or usage of any state
shall subject, or Cause to be subjected, any person
within the Jurisdiction of the United States to the
deprivation of any rights, privileges or immunities
secured by the Constitution of the United States shall,
any such law, statute, Ordinance, Regulation,
Custom, or usage of the State to the contrary
Notwithstanding be liable to the party injured
in any action at law suit in equity or other
proper proceeding for redress,
Such proceeding to be prosecuted in the several
District or Circuit Courts of the United States,

| | | |
|------------|-----------|--|
| | | WESSIE SIMS. (Attachments: # <u>1</u> Civil Cover Sheet)(jwl,) (Entered: 09/26/2012) |
| 09/25/2012 | | Summons Issued as to MARTIN G. BEDNAREK, LYNETTE M. BROWN, CITY AND COUNTY OF PHILADELPHIA, CITY OF PHILADELPHIA, LARISSA KLEVAN, ANTHONY LEWIS, MARY JANE MCKINNEY, CHRISTINE QUINN, STATE OF PENNSYLVANIA, SAM STATEN, JR, CAROL B. TINARI, JOHN V. WOLFE, ZONING BOARD OF ADJUSTMENTS. 13 Forwarded To: pro se plaintiff on 9/26/12 (jwl,) (Entered: 09/26/2012) |
| 10/05/2012 | <u>2</u> | MOTION FOR APPOINTMENT OF COUNSEL PURSUANT TO 28 U.S.C. 1915(d) FILED BY WESSIE SIMS.(mbh,) (Entered: 10/05/2012) |
| 10/11/2012 | <u>3</u> | ORDER THAT PLAINTIFF'S MOTION FOR THE APPOINTMENT OF COUNSEL IS DENIED. SIGNED BY HONORABLE LEGROME D. DAVIS ON 10/10/12. 10/12/12 ENTERED AND COPIES MAILED TO PRO SE. (mbh,) (Entered: 10/12/2012) |
| 10/24/2012 | <u>4</u> | Affidavit of Service re: JAMES ADAMS served Summons and Complaint upon SAM STATEN, JR., CAROL B. TINARI, JOHN V. WOLFE, CHRISTINE QUINN, MARY JANE MCKINNEY, ANTHONY LEWIS, LARISSA KLEVAN, LYNETTE BROWN and MARTIN BEDNAREK by Personal Service on 10/22/12 (mbh,) (Entered: 10/24/2012) |
| 11/13/2012 | <u>5</u> | MOTION TO DISMISS STATE OF PENNSYLVANIA FILED BY WESSIE SIMS..(mbh,) (Entered: 11/14/2012) |
| 11/21/2012 | <u>6</u> | AFFIDAVIT of Service by JAMES ADAMS re: served Summons and Complaint upon CITY OF PHILADELPHIA LAW DEPT and ZONING BOARD OF ADJUSTMENT by Certified Mail Return Receipt Requested (mbh,) (Entered: 11/21/2012) |
| 12/11/2012 | <u>7</u> | ORDER THAT PLAINTIFF'S UNOPPOSED MOTION TO DISMISS DEFENDANT STATE OF PENNSYLVANIA FROM THIS ACTION IS GRANTED. THE STATE OF PENNSYLVANIA IS HEREBY DISMISSED. SIGNED BY HONORABLE LEGROME D. DAVIS ON 12/11/12. 12/12/12 ENTERED AND COPIES MAILED TO PRO SE.(mbh,) (Entered: 12/12/2012) |
| 12/19/2012 | <u>8</u> | MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by CITY OF PHILADELPHIA.Memorandum, Certificate of Service.(TAYLOR, ANNE) (Entered: 12/19/2012) |
| 01/07/2013 | <u>9</u> | NOTICE of Appearance by SHARON N. HARVEY on behalf of WESSIE SIMS (HARVEY, SHARON) (Entered: 01/07/2013) |
| 01/07/2013 | <u>10</u> | RESPONSE in Opposition re <u>8</u> MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by WESSIE SIMS. (HARVEY, SHARON) (Entered: 01/07/2013) |
| 01/09/2013 | <u>11</u> | ORDER THAT PLAINTIFF HAS FAILED TO EFFECUATE PROPER SERVICE OF PROCESS UPON DEFENDANTS LYNETTE M. BROWN, CAROL B. TINARI, ANTHONY LEWIS, SAM STATEN, JR., MARTIN G. |